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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 417

THE UNITED STATES OF AMERICA AND MESTA MACHINE COMPANY, APPELLANTS

vs.

COUNTY OF ALLEGHENY, PENNSYLVANIA

Appeal From The Supreme Court Of The State of Pennsylvania

BRIEF FOR APPELLEE

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COUNTER-STATEMENT OF THE CASE

In order to bring into bold relief what appellee believes to be the real questions involved in this appeal, a counter-statement of the case is deemed necessary and advisable. For convenience, appellant The United States of America will be referred to as the Government; appellant Mesta Machine Company, a Pennsylvania corporation, as Mesta; appellee County of Allegheny, Pennsylvania, as the County; and the Commonwealth of Pennsylvania, as the State.

Mesta owns and operates for profit a mill or manufactory in West Homestead, a borough located in Allegheny County, Pennsylvania. A State statute (Act of 1933, P. L. 853, § 201, as amended by Act of 1941, P. L. 219; 72 PS § 5020-201; Appendix A to the brief for the

Government, p. 58), requires "the following subjects and property" to "be valued and assessed, and subject to taxation for all county, * * * *, borough, * * * * school, and poor purposes at the annual rate: (a) All real estate, to-wit: * * * *, mills and manufactories of all kinds, * * * *". This statute was derived from the Act of 1927, P. L. 491, (72 PS § 4781), which was derived from the Act of 1844, P. L. 486, (72 PS § 4781), which was derived from the Act of 1834, P. L. 509, (72 PS § 5071). (See the "Historical Note" immediately following each of the foregoing citations to Purdon's Statutes). The statute and its predecessors have thus been the continuous statutory law of the State for over a century.

By the settled decisional law of the State in construction of the statute, a "mill" or a "manufactory" is *an entity* comprised of the land, the buildings, and all machinery upon the premises and essential to its operation as a mill or manufactory. And by the settled decisional law of the State, a mill or manufactory is assessed in the name of and against the record owner of the land upon which it exists, without regard to contractual rights or obligations between such record owner and any third party concerning the entity or any of its constituent parts. (See the opinion of the Court below (R. 97-99) for a factual statement of the State law in both of these two respects).

In 1942, the proper assessing authority assessed Mesta's mill against Mesta, as required by the statute and the decisional law of the State, at a value of $3,901,504 (R. 36). This assessment included machinery upon the premises and essential to the operation of the mill, to the value of $2,489,085 (R. 35). Mesta thereupon

appealed to the Court of Common Pleas of Allegheny County from that assessment, upon the ground that $618,000 in value of the machinery included in the assessment of the mill belonged to the Government and was immune from the assessment of its mill. Upon a petition showing, *inter alia*, that it had contractually agreed to reimburse Mesta for "any applicable State or local taxes, fees, or charges which the Contractor [Mesta] may be required on account of this contract [a contract which will be hereinafter described] to pay on or for any plant, equipment, process, organization, materials, supplies, or personnel" (R. 43), the Government was granted leave to intervene in said appeal (R. 9-14)..

At the hearing of said appeal, the trial court, over objection by the County as to its materiality to the issue, admitted in evidence the above mentioned contract (R. 38-64) dated October 30, 1940, and a supplement thereto (R. 65-69), dated February 21, 1941, between the Government and Mesta, the primary purpose of which was the manufacture of a quantity of guns by Mesta for the Government at a fixed price per gun, subject to future adjustments for changes in labor costs only.

To facilitate the manufacture of the guns, Title I of the contract and its supplement required Mesta, "as an independent contractor and not as an agent of the Government" (R. 41), (1) to purchase in the open market, and install in its mill, certain machinery, tools, and equipment, (2) to manufacture in its own mill, and install therein, certain other machinery, and (3) to rebuild or readapt, and install in its mill, certain machinery owned by the Government and to be furnished by it. All of this machinery was eventually installed in Mesta's mill, and it was the inclusion of this machinery (valued

at said total amount of $618,000) in the assessment of the mill to which Mesta and the Government objected. Tabulated according to the three categories just mentioned, the values of the machinery as included in the assessment were as follows:

(1) Purchased by Mesta	–	$444,000 (R. 26, 36-37)
(2) Manufactured by Mesta	–	14,000 (R. 28, 36-37)
(3) Furnished by the Government	–	160,000 (R. 31, 36-37)
Total	–	$618,000

Article I-H of the contract (R. 46) provided in substantial effect that title to all of the said machinery should vest in the Government upon its inspection and acceptance thereof, but it also provided that "these provisions as to title being vested in the Government shall not operate to relieve the Contractor [Mesta] from any duties imposed under the terms of this contract". One of the duties imposed upon Mesta by the contract was the following (R. 45-46): "The Contractor hereby agrees that it will: (a) * * * * (b) * * * *; obey and abide by all applicable laws * * * * of the State * * * * wherein the work [of purchase, manufacture, rebuilding, and installation of said machinery] is done, or of any other duly constituted public authority."

By Title II of the contract (R. 49-50), the Government then proceeded to lease, or bail, all of said machinery to Mesta, whose liability with respect thereto was contractually fixed as that "of a bailee under a mutual benefit bailment" (R. 50). Mesta's use thereof was contractually limited to the manufacture of the guns in performance of the primary purpose of the contract, "except that the Contractor [Mesta] may use for

general purposes such machinery and equipment as is purchased or furnished to supplement its existing facilities" (R. 49). By Article II-E (R. 50), the contract required Mesta to remove all of the machinery from its premises upon termination of the provisions of the contract relating to the manufacture of the guns and to ship it as might be designated by the Government, unless a further contract to maintain it "in a stand-by condition" should subsequently be entered into between the Government and Mesta.

The trial court sustained the appeal. It reduced the assessment of Mesta's mill by the sum of $618,000, the value of the machinery involved. The opinion of the trial court is reported as *Appeal of Mesta Machine Co.*, 91 Pittsburgh Legal Journal 343, and is printed in the Record (R. 79-89).

Upon appeal by the County to the Supreme Court of Pennsylvania, the Court below, the decision of the trial court was reversed and the assessment of $3,901,504 of Mesta's mill for the year 1942 was restored and affirmed, at the cost of Mesta. The opinion (and judgment) of the Court below is officially reported as *Mesta Machine Company Case*, 347 Pa. State Reports 191, and is printed in the Record (R. 95-102). A dissenting opinion concurred in by two of the seven justices was filed (R. 102-110). A joint motion by Mesta and the Government for reargument (R. 115-122) was refused (see official report, 347 Pa. 191, 192).

The decision of the Court below (R. 95-102) reaffirmed the settled decisional law of the State hereinbefore mentioned. It held the Government's contractual title to the machinery involved to be immaterial and the assessment to have been made within, and in compliance

with, the settled law of the State. It held that the machinery to which the Government claimed title was not assessed as the property of the Government but "as the property of the Mesta Company" (R. 100). It held that "under the circumstances, [the assessing authority] was justified in treating the ground, building, and machinery [upon the premises] as an entity, a mill, or manufactory, and assessing it as such to the Mesta Company, the registered owner of the land" (R. 99). It held that "if the Mesta Company defaults in the payment of [any tax levied in consequence of the assessment made against it], the paramount rights of the government in the machinery [involved in Mesta's appeal from the assessment] could not be divested or in any way affected" (R. 100), thus establishing for any future eventuality the "law of the case" in such manner as to make applicable, should the occasion for its application ever arise, the ruling of this Court in *New Brunswick vs. United States,* 276 U.S. 547, to which, in so holding, the Court below specifically referred (R. 100). And it held, further, that "the legal obligation to pay was on the company and not on the government" (R. 100), and that "the government's status, as far as the [bailed] machinery is concerned, is precisely the same throughout, and it cannot [under the law of this State] suffer any loss by reason of the assessment of its machinery as part of the Mesta mill" (R. 100).

The Government and Mesta petitioned the Court below to be allowed to appeal its decision and judgment to this Court (R. 124). Their petition was allowed (R. 125-6), and their appeal (in joint form) was filed in this Court on Oct. 8, 1943. Under the provisions of Rule 12, par. (3), of the rules of this Court, the County filed

its statement opposing jurisdiction and motion to dismiss or affirm. The County's said statement and motion is based upon (a) the nature of the decision and judgment sought to be reviewed, as above outlined, (b) the absence of any Federal right or immunity under the Constitution of the United States, or otherwise, in either Mesta in its own right or in the Government, which is in any wise prejudiced or adversely affected by the appealed judgment, and (c) the comprehensive point that "in the factual situation presented, the construction and application of the State statute, as made by the appealed judgment, neither involves or could involve a Federal question, nor does it either affect or purport to affect in any manner whatsoever any Federal right or immunity possessed by either of the appellants severally or by both of them jointly." By an order entered herein on Oct. 25, 1943, this Court postponed further consideration of the question of its jurisdiction until the hearing of this case on the merits.

The factual situation may be thus summarized: By contract, the Government is a bailor of certain machinery installed by its bailee as an integral part of the bailee's mill for use by the bailee in the manufacture, for the bailee's profit, of guns for the Government and for other general purposes. The Government's bailee is the record owner of the land upon which its mill exists. The contract of bailment requires the bailee to obey and abide by the applicable laws of the State in which its mill is located and provides that the title of the Government as bailor shall not operate to relieve the bailee from performance of said duty. The contract of bailment requires the Government to reimburse the bailee for any applicable State or local taxes that the bailee

may be required, on account of the contract, to pay on or for its plant. The State court of last resort affirmed a statutory assessment against the bailee of the bailee's mill, for local tax purposes, as having been made in conformity with the settled law of the State, which requires every mill within the State to be assessed (as a single entity comprising all lands, buildings, and machinery upon the premises and essential to its operation as a mill) against the record owner of the land upon which the mill exists, irrespective of any contractual relations between such record owner and any third party concerning the title to any constituent part thereof. In so affirming said assessment, the State court of last resort held that, under the law of the State, the Government's title to the bailed machinery could not be divested or in any way affected by any failure of the bailee to pay any tax resulting from the assessment, that the legal obligation of the tax is on the bailee and not on the Government, and that the Government cannot suffer any loss by reason of the assessment.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

(1) Does the State law, as construed and applied by the appealed decision, impose an unconstitutional burden upon the Government?

(2) Does this Court have jurisdiction to review the decision of the State court in this appeal by the Government and its bailee?

SUMMARY OF ARGUMENT TO FOLLOW

As to the merits. If the Court takes jurisdiction, the question is whether the State law, as construed and applied by the appealed decision, imposes an unconstitutional burden upon the Government by a judicially discernible interference with its functioning. The Government's contractual assumption of the increase in tax due to the bailment is merely an economic burden voluntarily assumed and has no bearing upon the question. The Government's argument as to the nature and effect of the affirmed assessment is based upon false premises of fact. When viewed in the light of the actual facts, the case does not involve the assessment of any property of the United States whatsoever. The thing assessed is Mesta's mill as a single entity. All property rights of the Government in the bailed machinery remain untouched by the assessment. The legal incidence of the resultant tax is solely upon Mesta's land and upon Mesta personally as the person solely and ultimately liable, with no legal right of subrogation in Mesta against the Government (or against any other bailor in like position). The assessment and tax are non-discriminatory as to both the Government and Mesta. Apart from its contractually assumed liability, the Government suffers no burden whatsoever by the affirmed assessment. The State law, as construed and applied, effects no judicially discernible interference with the functioning of the Government. As on its merits, the appealed judgment should be affirmed.

As to the jurisdiction. No Federal right is actually involved in the appealed decision. Decision of the Federal question presented (*i. e.*, the immunity from State

taxation of property of the United States) is not necessary to a determination of the cause. It was not decided below. Its decision was not necessary to the appealed judgment as rendered. The decision below was based upon a determination, under State law, that the subject matter of the assessment was not the property as to which the claim of immunity was made. It was made upon grounds having no relation to any Federal question. In such case, the decision of a State court is not reviewable. No Federal right of either the Government or Mesta is adversely affected or prejudiced by the appealed decision. Consequently, this Court is without jurisdiction either by appeal or by petition for certiorari.

Conclusion. This appeal is just an ill-disguised effort by the Government to escape from an improvidently made bargain. All other interests of the Government are fully protected by the appealed decision. The judgment below is just and equitable. It should be affirmed, or the appeal (whether considered as an appeal or as a petition for certiorari) should be dismissed for want of jurisdiction.

ARGUMENT

I.

The State law, as construed and applied by appealed decision, imposes no unconstitutional burden upon the Government.

(1). The Government admits that its contractual obligation to reimburse Mesta for the increase in local taxes resulting from the increase in the assessment of its mill, due to the installation of the bailed machinery, is an economic burden voluntarily assumed and constitutes no grounds for assertion of an unconstitutional burden: *Alabama vs. King & Boozer,* 314 U.S. 1, 9, and other similar decisions. Hence, that factual element of the present case has no bearing upon the question under argument.

(2). The relevant doctrine now being applied by this Court upon the question under argument finds expression in numerous recent cases. With elision of immaterial matter, citations, and internal quotation marks, we quote from a few of them, as follows:

(a) "As neither government may destroy the other nor curtail in any substantial manner the exercise of its powers, * * * * the limitation upon the taxing power of each, so far as its effects the other, must receive a practical construction which permits both to function with the minimum of interference each with the other; and that limitation cannot be so varied or extended as seriously to impair either the taxing power of the government imposing the tax * * * * or the appropriate ex-

ercise of the functions of the government affected by it": *James vs. Dravo*, 302 U.S. 134, 156-7.

(b) "In numerous decisions we have had occasion to declare the competing principle, buttressed by the most cogent considerations, that the power to tax should not be crippled by extending the constitutional exemption from taxation to those subjects which fall within the general application of non-discriminatory laws, and where no direct burden is laid upon the governmental instrumentality and there is only remote, if any, influence upon the exercise of the functions of government. * * * * Immunity from non-discriminatory taxation sought by a private person for his property or gains because he is engaged in operations under a government contract or lease cannot be supported by merely theoretical conceptions of interference with the functions of government. Regard must be had to substance and direct effects. And where it merely appears that one operating under a government contract or lease is subjected to a tax with respect to his profits [or his property] on the same basis as others who are engaged in similar businesses, there is no sufficient ground for holding that the effect upon the government is other than indirect and remote": *Helvering vs. Producers Corp.*, 303 U.S. 376, 385-7.

(c) "Since two governments have authority within the same territory, neither through its power to tax can be allowed to cripple the operations of the other. Therefore state and federal governments must avoid exactions which discriminate against each other or obviously interfere with one another's operations": *Graves vs. O'Keefe*, 306

U.S. 466, 488. (In the same case, at p. 483, referring to *Helvering vs. Gerhardt,* 304 U.S. 405, this Court said: "It was there pointed out that the implied immunity of one government and its agencies [*a priori,* its contractors] from taxation by the other should, as a principle of constitutional construction, be narrowly restricted").

(d) "The trend of our decisions is not to extend governmental immunity from state taxation * * * * beyond the national government itself and governmental functions performed by its officers and agents". (The Court had previously said on p. 269 of the case now under quotation that "those who contract to furnish supplies or render services to the government are not such agencies and do not perform governmental functions"). "We have recognized that the Constitution presupposes the continued existence of the states functioning in coordination with the national government, with authority in the states to lay taxes * * * * and that state * * * * taxation inevitably imposes some burdens on the national government of the same kind as those imposed on citizens of the United States within the state's borders": *Penn Dairies vs. Milk Commission,* 318 U.S. 261, 270-1.

From the language of these cases, we submit that the applicable criterion may be thus stated: Constitutional immunity from State taxation must result from a consideration of the "nature and effect" of the alleged burden. There is no basis for any implication where the "burden" is unsubstantial and undiscernible. To be substantial and discernible, the "burden" must constitute an "interference" with the functioning of the

Government,—not an imaginary "interference" but one that actually interferes.

(3). In the light of the actual facts in this case, what is the true "nature and effect" of the State law?

The brief for the Government proceeds upon false premises of fact. But facts are stubborn things. They do not yield to argument that fails to take proper account of them. The false premises of the Government's argument will be shown:

(a) The subject matter of the statutory assessment is not "machinery". It is "mills and manufactories". "While the property [*i.e.*, the mill] might have been valued in one item, the integrity of the assessment [of the mill] was not affected by the fact that the assessor enumerated the elements entering into the aggregate of the valuation and placed a separate value on each": *Guthrie vs. Pittsburg Dry Goods Co.*, 47 Pa. Superior Ct. 384, 400, (a case cited by the Court below in discussing the settled law of the State,—R. 98). The Government thus begins with clear factual error when it treats the bailed machinery "as a separate, taxable item" (footnote 8, page 23 of its brief). It is not. The thing assessed and taxed is the *"mill"* as a single entity.

(b) The Pennsylvania concept of a "mill" as constituting a single assessable entity necessarily requires that some *one person* be selected by the law as its taxable owner. With sound practical reason, the State law goes straight to *terra firma* and selects the record owner of the land as the owner of the entity. Since Mesta is that person in

the instant case, the owner of the thing assessed and taxed here is Mesta and not the Government. By settled State law, then, this is the fact of the case,—a fact which the Government's argument attempts to avoid but which may not be avoided.

Reference to Exhibits A and B (R. 35-36) and the testimony concerning them (by witness Sexton, R. 16-17, and by witness Cosgrove, R. 18-19) shows clearly the manner in which the assessments of Mesta's mill (including land, buildings, and installed machinery) were made for the years 1941 and 1942, in compliance with the requirements of the settled State law. For the purpose of comparison, these two assessments may be graphically shown thus:

	1941 Assessment	1942 Assessment	
Land	$ 274,855	$ 293,795	
Buildings	761,150	1,118,624	after allowance of exoneration of $4,500
Machinery	1,519,585	2,489,085	
Total	$2,555,590	$3,901,504	

The increase in the 1942 assessment over the 1941 assessment was due to the fact (testimony of witness Cosgrove, bottom R. 18) that "the Mesta Company in 1941 acquired some new land, built additional buildings, and also installed new machinery." The *fact* then is that the 1942 assessment of Mesta's mill was made pursuant to settled State law, as held by the Court below (R. 99). Ac-

cordingly, when the Government, in footnote 8 on p. 23 of its brief, states that the 1942 assessment "was not made on the theory that the Government's [bailed] machinery merely enhanced the value of the land and buildings concededly owned by Mesta", the Government is not stating a fact. The *fact* is that the 1942 assessment *was made,* as required by State law, upon the theory that the value of Mesta's mill was enhanced over its value in 1941 by the value of the newly acquired land, the additional buildings, and the newly installed machinery, including the Government's bailed machinery. (It was entirely proper that the value placed upon the bailed machinery for the purpose of the assessment was its full value: *New Brunswick vs. United States,* 276 U. S. 547).

(c) Now, what are the *facts* concerning the machinery to whose inclusion in the assessment the Government and Mesta object? Passing over the legal magic by which machinery purchased or manufactured by Mesta, as an independent contractor and not as an agent of the Government, could, in the possession of Mesta, contractually become the property of the Government, as against third parties, by the mere process of "inspection and acceptance" (as to that purchased) or by merely being "completed or in the course of construction" (as to that manufactured),—the *fact* is that the contract required Mesta to obey and abide by the applicable law of Pennsylvania and specifically provided that the Government's "title" should not operate to relieve Mesta from performance of that duty. Now, if the law of Pennsylvania is such as to require in-

clusion in the assessment of Mesta's mill of *all machinery* upon the premises essential to its operation as a mill (as is the fact), does it not follow that, by this specific agreement between the contracting parties, the Government's peculiarly acquired "title" to the machinery purchased and manufactured by Mesta was expressly eliminated as grounds for the immunity from inclusion in the assessment of Mesta's mill which the Government and Mesta now claim? What other possible effect could the parties have intended? The *fact* then is that both Mesta and the Government expressly subordinated the Government's "title" to that machinery to the operation of the settled State law.

(d) Now, moving on to the contract of bailment by which the Government bailed to Mesta not only the machinery purchased and manufactured by it but also the Government's own Watervliet Arsenal machinery, what are the *facts* as concerns property rights in consequence of this bailment? Is it not elementary law that, as bailee of all of this machinery, Mesta is possessed of a property right in the subject matter that is equivalent to full proprietorship or actual ownership as to all the world except the Government, the bailor? By what token, then, does the Government assert the fact in this case to be that, for the purpose of this assessment and tax, the Government "owns" this bailed machinery and thus contradict the holding of the Court below that it was included in the assessment "as the property of Mesta" and not as the property of the Government?

Reference to what the Government calls a "finding" by the trial court (page 11 of its brief) that the machinery was "owned by the United States" does not help it. Neither that court nor any other court can alter the *actual facts*. Nor does the Government's reference to what it calls a recognition by the Court below that the United States "owned" the machinery and that "legal title to it" was "actually in the Federal Government" (page 13 of its brief) affect the *actual facts*. Obviously, the "legal title" actually in the Federal Government was merely the title of a bailor. And even that "title", as concerns the machinery purchased and manufactured, was held, by contractual agreement effective upon its original acquisition, in subordination to the law of Pennsylvania, as shown in (c) above.

(e) The Government closes its eyes to the fact that, under settled State law, any contractual relations between a mill-owner and any third party, as concerns machinery installed in the mill and essential to its operation as a mill, are immaterial to the assessment of the mill. That is a matter with which, under settled State law, the assessor is not concerned (R. 99). The State law in this respect results from the provision of the Constitution of Pennsylvania, Art. IX, Sect. 1, which requires that "all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax": *Bemis v. Shipe*, 26 Pa. Superior Ct. 42, 45, a case cited in the appealed decision (R. 98) in exposition of State law.

(f) The Government states the fact to be that the Court below failed to rule as to whether, apart from Mesta's contractual right, the State law gives Mesta a legal right of reimbursement against the Government. That is not a fact. The Court below stated in the appealed decision itself that "the legal obligation [is] on Mesta and not on the Government" (R. 100) and that the Government "cannot suffer any loss by reason of [the inclusion in] the assessment of [the value of] its [bailed] machinery as part of the Mesta mill" (R. 100). In its motion for re-argument, the Government pressed the contentions that "the law itself subrogates Mesta Machine Company to the position of the taxing body for the purposes of collecting the tax" (R. 117), that "the effect is to impose a tax upon the United States" (R. 117), and that the decision of the Court was arrived at "by ignoring the liability of the Government to pay the tax irrespective of contract" (R. 120). The refusal of re-argument in the face of these contentions is sufficient proof of the intention of the Court below as expressed in its decision and settles against the Government any contention here that, under the law of the State, the so-called "legal incidence" of the tax is upon the Government.

(g) The Government then assumes the fact to be that, under Pennsylvania law, when a mill is assessed and taxed as an entity, including bailed machinery upon the premises, (as it must be), the mill-owning taxpayer (*i.e.* the record owner of the land upon which the mill exists) has an action over against the bailor of the machinery for contribution of a proportionate amount of the tax against the

mill computed upon the ratio of the value of the bailed machinery included in the assessment to the assessed value of the mill. This is certainly strange "law" to a Pennsylvania lawyer. Does the Government expect this Court to swallow that statement of Pennsylvania law upon the Government's bare assertion of it, without the slightest supporting authority either in the appealed decision or in any other Pennsylvania decision? Appellee simply denies the assumed fact and confidently challenges the Government to prove it.

The statement itself shows that the Government has a completely erroneous factual conception of the settled law of Pennsylvania as re-affirmed in the appealed decision. The thing assessed is the mill. It is assessed against the record owner of the *land*. It is the *land* that is charged with the lien of a tax levied upon the assessment. (If the Pennsylvania "tax lien" Act of 1901, P. L. 364, 53 PS §2022, cited by the Government at p. 24 of its brief and printed in Appendix A thereto at p. 58, has any application whatsoever to bailed machinery in a mill, surely the exhaustive research evidenced by the brief for the Government would have discovered some supporting authority for such a proposition. None is cited. We know of none. The implication of the appealed decision itself is expressly to the contrary).

The indivisible nature of the assessment of a mill and of the resultant tax provides a solid basis for subrogation against the real owner of the *land* as the real owner of the *mill*. But the same indivisible nature of the tax obviously destroys any pos-

sibility of any such a *pro tanto* subrogation against the bailor of machinery installed in the mill as the Government imagines. The respective rights and duties of bailor and bailee are fixed by their contract of bailment. These rights and duties *inter sese* are not affected by the assessment and tax of the mill. (The Pennsylvania "landlord and tenant" Act of 1804, P. L. 517, cited at p. 26 of the Government's brief and printed at p. 59, has no possible application to the point). If the Government's notion were supportable either in law or in reason, why was it not advanced in the motion for re-argument below so as to obtain a decision upon it? It is obviously just an "afterthought" presented here. But this Court neither makes State law nor will assume that State law, when made, will be unconstitutionally discriminatory.

In the light of these *actual facts*, it becomes plainly apparent that the true "nature and effect" of the State law is not as contended by the brief for the Government. By its true "nature and effect", there is no tax levied upon any property of the United States. It imposes no legal obligation upon the United States (or upon any "person in the position of the United States", as the Government phrases its point). There is no warrant for the mere assertion that the law of the State gives "a remedy of reimbursement" to a taxpaying mill-owner for recovery against his bailor of the increase in the tax attributable to the installation of bailed machinery in his mill. Consequently, the true "nature and effect" of the State law touches neither the Government nor Mesta as regards any Federal right of immunity of property from taxation. Nor does it discriminate in any way against either Mesta or the Government.

The Government's strong reliance upon the principle of *Van Brocklin vs. Tennessee,* 117 U. S. 151, is misplaced. It is not applicable to the circumstances here. The *Van Brocklin* case was an attempted enforcement of a lien upon property the whole title to all property rights in which was in the United States when the lien, resulting from a direct tax attempted to be imposed upon it, was claimed to have attached. The case at bar is easily distinguishable. Here, the United States is not possessed of all property rights in the machinery involved but is possessed merely of the property rights of a bailor. Here, the subject matter of the challenged assessment is not even the property rights of the United States in the bailed machinery but, as held below, is the bailee's mill as a single entity which includes the bailed machinery "as the property of the Mesta Company", the bailee, (R. 100). Here the property rights of the United States in the machinery, by the appealed decision itself, are not subject to any lien of any tax resulting from the assessment made. Here, those rights, under the law of the State as declared in the appealed decision itself, can never be divested or in any way affected at any future time in consequence of the assessment made or any tax levy based thereon. In the hands of any subsequent owner of this machinery, by transfer to him by the Government of its title thereto, the machinery will stand free and clear of any charge resulting from the assessment made and any tax levied in consequence of it. And it will do so by force of the appealed decision in this case itself. Clearly, the principle of the *Van Brocklin* case has no possible application here.

What has been just argued as to the *Van Brocklin* case effectually disposes of all other similar cases cited

by the Government except *United States vs. Rickert*, 188 U. S. 432, which requires special consideration but is, likewise, clearly distinguishable from the case at bar. In the *Rickert* case, referring to personal property that had been assessed and taxed under a State law, this Court said: "It was, in fact, the property of the United States, and was put into the hands of the Indians to be used in execution of the purpose of the Government in reference to them. The assessment and taxation of the personal property would necessarily have the effect to defeat that purpose", because, as this Court had previously said in the same opinion, "To say that these lands [which were likewise assessed and taxed,—the Indians being wards of the Government and possessors of the lands as prospectively ultimate grantees from the United States] may be assessed and taxed by the County of Roberts under the authority of the State, is to say that they may be sold for taxes." In that case, the Government had a paternal interest in its Indian wards into whose hands it had placed the personal property to which this Court referred. It thus was not dealing at arm's length there with the possessors of its property. Here, in the case at bar, the machinery is the subject matter of a contract of bailment made by the Government with an independent contractor for the latter's profit,—a distinction with a very decided difference. Furthermore, in the *Rickert* case, the law of the State was such as permitted the sale of the assessed and taxed property for recovery of the taxes, whereas here, in the case at bar, the law of the State as declared in the appealed decision itself, is directly to the contrary. Hence, the case here is certainly not the *Rickert* case.

(4). Because of the true "nature and effect" of the State law, the whole of the Government's argument (including that under Part II, pp. 31 to 57, of its brief) is totally ineffective in support of any contention that the appealed decision imposes an "unconstitutional burden" upon the United States.

A "test" for a tax is proposed by the Government's argument in a variety of ways. For example, on p. 44, it is referred to as the "legal incidence" or the "legal thrust" of the tax exaction,—is it upon the Government? Again, on p. 45, it is stated as one of "who is the real taxpayer, made ultimately liable for payment" by the challenged State law. Let the Government's own "test" be applied to the actual facts in the case. The result is that this is not a case of tax upon Government property sought to be validated by its collectibility from Mesta, as argued by the Government. It is a case of tax upon the property of the Government's contractor, Mesta, and whose "legal incidence" or "legal thrust" is solely upon Mesta's land and upon Mesta personally as the real taxpayer ultimately and solely liable. Consequently, the case meets the "test" proposed by the Government.

(5). The argument for the Government tries to avoid as much as possible the important fact in this case that the machinery here involved was bailed by the Government into the hands of Mesta *for Mesta's profit.* Even if the bailed machinery itself were the actual subject matter of the State assessment for tax purposes, it would seem that such an assessment and resultant tax should be upheld.

The case then would be "the case of a corporation having its own purposes as well as those of the United States and interested in profit on its own account", the

case supposed and inferentially approved in *Clallam County vs. United States,* 263 U.S. 341, 345, where the Court distinguished such a case from the "governmental agency" case there before it.

Contrary to the statement on p. 27 of the brief for the Government that Pennsylvania law does not permit taxation of property owned by a subdivision of the State "in circumstances analogous to those here", the true fact is that Pennsylvania law *does* permit such taxation. In *Pittsburgh School District vs. Allegheny County,* 347 Pa. 101, (decided April 19, 1943, re-argument refused May 10, 1943,—both prior to the appealed decision here), the Court distinguished the cases cited by the Government and held that land leased out by a school district for a commercial enterprise was taxable. And in *Kittanning Borough vs. Armstrong County,* 347 Pa. 108, (decided the same day), the Court applied the same rule to borough owned property rented out for commercial use.

New Brunswick vs. United States, 276 U.S. 547, holds that State asssessment and taxation of property which the Government places in possession of another is permissible so long as the Government's interest in the property is protected from sale for collection of the tax. When, in recognition of that holding, the State law is declared (as it is in this case) to be such as prevents any divestiture of the property rights of the Government in the bailed machinery, any possible objection to a direct assessment of it against the bailee is automatically eliminated. The "legal incidence" of a tax levied upon such an assessment would then be upon Mesta's property rights as bailee and upon Mesta as the person solely liable. Certainly, this is the clear implication of the appealed decision.

But, as hereinbefore shown, the actual subject matter of the assessment here is Mesta's mill and not the bailed machinery. Hence, the argument just made in this sub-section is merely academic and not strictly in point. It would be applicable, however, if the bailed machinery were the thing assessed and taxed, as assumed by the argument for the Government.

(6). Returning now to the language of this Court quoted in (2) above and the applicable criterion believed to be established by this Court for determination of the question under argument, the real and pertinent inquiry is whether there is a judicially discernible "interference" with the functioning of the Government in the State law as construed and applied in this case. The quoted language of this Court itself supplies the answer. It need not be repeated. The plain fact of the case is that it presents no "interference" whatsoever with the functioning of the Government, either direct or indirect. There is no such thing as a Governmental "right" to impose a contract upon any private person. Nor is there any such thing as a "duty" upon any individual to enter into a contract with the Government. If, in consequence of the Government contractor's performance of the contract into which both parties have voluntarily entered, a duty of compliance with State law imposing an increased tax upon his property falls solely upon the contractor and his property, that fact constitutes no "interference" with the functioning of the Government. Obviously, any hesitancy upon the part of the contractor to enter into such a contract (as weakly suggested on p. 40 of the brief for the Government) has no bearing upon the matter, for the same factor would be present in his negotiation of a similar contract with any one.

In no uncertain terms, this Court has but lately announced a steadfast purpose to maintain the relevant doctrine applicable to the case at bar. "Recognizing that equality of privilege and equality of obligation should be inseparable associates, we have recently swept away many of the means of tax favoritism. * * * * The trend of these cases should not now be reversed": *Oklahoma Tax Commission vs. United States,* 319 U.S. 598, 610.

As upon its merits, the appealed judgment should accordingly be affirmed.

II.

This Court has no jurisdiction to review the appealed judgment and decision.

(1). It is of course true that, where a Federal right is concerned, this Court is not bound by the characterization given to a state tax by a state court or relieved from the duty of considering the real nature of the tax and its effect upon the federal right asserted: *Carpenter vs. Shaw,* 280 U.S. 363, 367. But unless a Federal right is actually involved in the appealed decision, the state court's application of local laws is not subject to review by this Court: *Campbell vs. Olney,* 262 U.S. 352, 354, and cases cited.

(2). "It is essential to the jurisdiction of this Court in reviewing a decision of a court of a state that it must

affirmatively appear from the record, not only that a federal question was presented for decision to the highest court of the state having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it": *Lynch vs. New York,* 293 U.S. 52, 54, and numerous cases there cited.

(3). Where an immunity of certain property from taxation under the Constitution is claimed and there can be no pretense that the state court, in construing and applying the state statutes in such a way as to uphold the tax, adopted its view in order to evade a constitutional issue, and the case has been decided upon grounds having no relation to any federal question, this Court accepts the decision and will not review it: *Nickel vs. Cole,* 256 U.S. 222.

(4). Where the action of an assessor under a state statute is held by the state court, in construing both the statute and the assessor's action, to have been one in assessment of property properly subject thereto, and not property whose taxation would violate the Constitution (commerce clause),—the decision of the state court, in the respect stated, is not reviewable by this Court: *Wells, Fargo & Co. vs. Nevada,* 248 U.S. 165.

(5). Where a claim of a Federal right involved a question of construction of a state statute prohibiting taxation of property of the United States, and the state

court holds that the thing assessed was not the property of the United States, the construction of the state statute and the conformity to it of the proceedings of the taxing officials were questions exclusively for the Supreme Court of the State, and this Court has no authority to review its determination of them: *Elder vs. Wood*, 208 U.S. 226, 231-2.

(6). It is both fundamental and elementary, of course, that this Court will not entertain an appeal by one who has suffered no injury by the force and effect of the decision attempted to be appealed. An appellant from a State court decision must himself be prejudiced or adversely affected, by the appealed decision, as to a Federal right or immunity possessed by himself or derived from another who is so possessed. More pointedly, in order to give this Court jurisdiction to review the action of a State court sustaining a State statute charged to be unconstitutional, as construed and applied, the question must be raised in this Court by one adversely affected by the decision: *Braxton vs. West Virginia*, 208 U.S. 192.

(7). Coming now to the appealed decision at bar, appellee contends that, once its full import is clearly understood, the principles above stated make it unreviewable by this Court in the pending appeal. The official syllabus of the official report of the decision shows the absence of any ruling upon any Federal question except one pertaining to the due process clause of the Fourteenth Amendment, a question which is in no wise involved in this appeal. What the Court below actually did in its decision was to dispose of the claim

of immunity in such a way, under State law, as to void the case of any Federal question concerning it. And, while doing so, it declared the State law to be such as to prevent any possible injury to the United States in consequence of its decision. In other words, without any pretense of adoption of its view in order to evade a constitutional issue, the Court below, by construction and application of the State law itself to the circumstances, decided the case before it in such a way as to eliminate any claim of constitutional violation and did so without harm to the Government. Consequently, the appealed decision is not reviewable here at the instance of the Government.

(8). So far as Mesta is concerned, it has no constitutional immunity in its own right. Any complaint by it must be derivatively as through the Government. Since the appealed decision is not reviewable here at the instance of the Government, it is not reviewable at the instance of Mesta.

(9). For the above reasons, all of which are substantially set forth in appellee's separately printed "Statement Opposing Jurisdiction and Motion to Dismiss or Affirm" and are covered in appellee's Counter-Statement of the Case, *supra*, appellee respectfully contends this Court to be without jurisdiction in this appeal, whether it be treated as an appeal or as a petition for certiorari.

III.

Conclusion

This appeal is just an ill-disguised effort by the Government to escape from an improvidently made bargain. All other interests of the Government are fully protected by the appealed decision.

The judgment below is just and equitable. It should be affirmed, or the appeal should be dismissed for want of jurisdiction.

Respectfully submitted,

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